UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF CALIFORNIA

VALERIE BROOKS, individually and on behalf of all others similarly situated,

Plaintiff,

v.

VITAMIN WORLD USA CORPORATION, a New York corporation; and DOES 1 to 10, inclusive,

Defendants.

No. 20-cv-01485-MCE-KJN

MEMORANDUM AND ORDER

Through the present action, Plaintiff Valerie Brooks, who is legally blind, seeks redress from Defendant Vitamin World USA Corporation ("Defendant") on grounds that Defendant's website is not fully accessible to the visually impaired and therefore violates both the Americans with Disabilities Act, 42 U.S.C. §§ 12181, et seq. ("ADA") and California's Unruh Civil Rights Act, California Civil Code §§ 51, et seq. Plaintiff also seeks class-wide relief, including injunctive relief, statutory damages, and attorney's fees and costs, on behalf of all others similarly situated.

Defendant originally filed an Answer on October 16, 2020, and Plaintiff filed a Motion to Strike Affirmative Defenses Nos. 1–15 and 17–19. ECF Nos. 7, 8. On November 19, 2020, Defendant filed a Motion for Leave to File Amended Answer, which

Plaintiff did not oppose. ECF No. 12. The Court granted Defendant's motion and denied Plaintiff's first Motion to Strike Affirmative Defenses as moot on March 16, 2021. ECF No. 17. On April 1, 2021, Defendant filed its Amended Answer to Plaintiff's Complaint, which includes four (4) affirmative defenses. ECF No. 18. Presently before the Court is Plaintiff's Motion to Strike two (2) of those defenses ("Motion"), filed April 22, 2021. ECF No. 19. For reasons set forth below, Plaintiff's Motion is GRANTED in part and DENIED in part.[1]

STANDARD

An affirmative defense is an "assertion of facts and arguments that, if true, will defeat the plaintiff's [ ] claim, even if all the allegations in the complaint are true." Black's Law Dictionary (10th ed. 2014). A court may strike a defectively pled affirmative defense under Federal Rule of Civil Procedure 12(f),[2] which authorizes the removal of "an insufficient defense." However, motions to strike such defenses are "regarded with disfavor because of the limited importance of pleading in federal practice, and because they are often used as a delaying tactic." Dodson v. Gold Country Foods, Inc., No. 2:13-cv-00336-TLN-DAD, 2013 WL 5970410, at * 1 (E.D. Cal. Nov. 4, 2013) (citing Neilson v. Union Bank of Cal., N.A., 290 F. Supp. 2d 1101, 1152 (C.D. Cal. 2003)). "Accordingly, courts often require a showing of prejudice by the moving party before granting the requested relief." Vogel v. Linden Optometry APC, No. CV 13–00295 GAF (SHx), 2013 WL 1831686, at *2 (C.D. Cal. Apr. 30, 2013) (citing Quintana v. Baca, 233 F.R.D. 562, 564 (C.D. Cal. 2005)). Where no such prejudice is demonstrated, motions to strike may therefore be denied "even though the offending matter was literally within one or more of the categories set forth in Rule 12(f)." N.Y.C. Emps.' Ret. Sys. v. Berry, 667 F. Supp. 2d

[1] Having concluded that oral argument would not be of material assistance, the Court submitted this matter on the briefs pursuant to E.D. Local Rule 230(g).

[2] All subsequent references to "Rule" or "Rules" are to the Federal Rules of Civil Procedure.

1121, 1128 (N.D. Cal. 2009). Ultimately, "whether to grant a motion to strike lies within the sound discretion of the district court." Cal. Dep't of Toxic Substances Control v. Alco Pac., Inc., 217 F. Supp. 2d 1028, 1033 (C.D. Cal. 2002).

District courts in this circuit were previously split on whether the heightened pleading standard that the United States Supreme Court announced in Bell Atlantic Corporation v. Twombly, 550 U.S. 544 (2007), and Ashcroft v. Iqbal, 556 U.S. 662 (2009), applied to affirmative defenses. Some courts, including this Court, concluded that affirmative defenses were subject to the heightened pleading standard. See, e.g., Wine Group LLC, v. L. and R. Wine Co., No. 2:10-cv-022040-MCE-KJN, 2011 WL 130236, at *2 (E.D. Cal. Jan. 4, 2011); Dodson v. Strategic Rests. Acquisition Co. II, LLC, 289 F.R.D. 595 (E.D. Cal. 2013). Other courts, however, declined to apply the heightened pleading standard to affirmative defenses, citing Wyshak v. City National Bank, 607 F.2d 824, 826 (9th Cir. 1979), for the proposition that the pleadings need only provide the plaintiff "fair notice" of the defense. See, e.g., Kohler v. Staples the Office Superstore, LLC, 291 F.R.D. 464, 468 (S.D. Cal. 2013).

The Ninth Circuit, however, has resolved the split in the district courts. In Kohler v. Flava Enterprises, Inc., the Ninth Circuit explained that "the 'fair notice' required by the pleading standards only requires describing [an affirmative] defense in 'general terms.'" 779 F.3d 1016, 1019 (9th Cir. 2015) (quoting 5 Charles Alan Wright & Arthur Miller, Federal Practice and Procedure § 1274 (3d ed. 1998)).[3] Accordingly, this Court applies the "fair notice" standard, and not the heightened pleading standard announced in Twombly and Iqbal, when evaluating motions to strike affirmative defenses.

"[A] district court should grant leave to amend even if no request to amend the pleading was made, unless it determines that the pleading could not possibly be cured

[3] The specific sentence that the Ninth Circuit quoted in Kohler provides: "As numerous federal courts have held, an affirmative defense may be pleaded in general terms and will be held to be sufficient, and therefore invulnerable to a motion to strike, as long as it gives the plaintiff fair notice of the nature of the defense." Wright & Miller § 1274 (footnotes omitted).

by the allegation of other facts." Lopez v. Smith, 203 F.3d 1122, 1130 (9th Cir. 2000) (internal quotation marks omitted); see also Fed. R. Civ. P. 15(a).

ANALYSIS

A. Motion to Strike Is Not Untimely

Defendant first contends that Plaintiff's Motion is untimely because "Plaintiff failed to raise any objection to Defense Nos. 2 and 4 when Defendant filed its Motion to Amend and proposed Amended Answer" back in November 2020. Def.'s Opp'n Mot. Strike, ECF No. 21 at 4. However, the Court is unaware of and Defendant has not cited any authority requiring Plaintiff to oppose an amendment to Defendant's answer before filing a motion to strike affirmative defenses. See Fed. R. Civ. P. 12(f) (stating, in part, that the court may strike an insufficient defense on its own or on a motion made by a party within 21 days after service). As Defendant recognizes, Plaintiff filed the present Motion within 21 days after Defendant re-filed its Amended Answer and thus, the Court finds Defendant's argument unpersuasive.

B. Motion to Strike Affirmative Defense No. 2 (Laches and/or Estoppel)

Plaintiff moves to strike Affirmative Defense No. 2, which provides the following:

> Plaintiff's claims are barred, in whole or in part, by the doctrines of laches and/or estoppel (a) because Plaintiff failed to ask for or seek any assistance or take advantage of alternative methods provided by Defendant for access, such as contacting [Defendant] th[r]ough the customer service number provided on the website; (b) because Plaintiff made no pre-suit demand that may have brought resolution to this matter; and (c) to the extent that Plaintiff did not take the actions stated in (a) and (b) in a timely manner.

Amended Answer, ECF No. 18 at 10–11. First, Plaintiff contends that the language in subsection (a) and subsection (c) as it relates to subsection (a) is repetitive of Affirmative Defense No. 1. Pl.'s Mot. Strike, ECF No. 19 at 12; see Amended Answer, ECF No. 18 at 10 (asserting in Affirmative Defense No. 1 that although "Defendant was ready, willing, and able to accommodate Plaintiff's alleged disability[,] . . . Plaintiff never asked for or

sought any assistance or used the alternative methods of access provided," such as calling Defendant's customer service number). In support, Plaintiff only cites Fantasy, Inc. v. Fogerty for the proposition that "[t]he function of a [Rule] 12(f) motion to strike is to avoid the expenditure of time and money that must arise from litigating spurious issues by dispensing with those issues prior to trial." 984 F.2d 1524, 1527 (9th Cir. 1993), rev'd on other grounds, 510 U.S. 517 (1994). Without more, the fact that there is some repetition of factual assertions is insufficient to warrant striking of Affirmative Defense No. 2 and, in any event, Plaintiff has not shown that she would actually be prejudiced by its inclusion.

Plaintiff also argues that there is no pre-suit demand requirement under the ADA or Unruh Civil Rights Act and thus, subsection (b) and subsection (c) as it relates to subsection (b) of the affirmative defense fail as a matter of law. Pl.'s Mot. Strike, ECF No. 19 at 12. However, as explained by Defendant, "the defense is not that Plaintiff failed to make a required pre-suit demand—it is that Plaintiff unreasonably delayed in bringing this lawsuit. The fact that Plaintiff failed to make a pre-suit demand is one fact that shows, together with the other circumstances alleged, her delay has caused prejudice to Defendant, and there, the claims should be equitably barred." Def.'s Opp'n Mot. Strike, ECF No. 21 at 6–7.

Finally, Plaintiff asserts that Affirmative Defense No. 2 fails to satisfy the fair notice standard and explain how Plaintiff unreasonably delayed in bringing this lawsuit. Pl.'s Reply Mot. Strike, ECF No. 22 at 3–4. "[U]nder the fair notice standard, Defendant does not need to plead a detailed statement of the facts upon which the defense is based." Springer v. Fair Isaac Corp., No. 14-CV-02238-TLN-AC, 2015 WL 7188234, at *4 (E.D. Cal. Nov. 16, 2015) (citation omitted). Here, Defendant's statements, "despite being vague and general, . . . put Plaintiff on notice of Defendant's intentions to claim . . . affirmative defense[s] under the doctrine[s] of [laches and estoppel; these] statement[s] sufficiently state[] the nature and grounds for the affirmative defense[s] . . . as required

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by the fair notice standard." Id. Accordingly, Plaintiff's Motion to Strike Affirmative Defense No. 2 is DENIED.

C. Motion to Strike Affirmative Defense No. 4 (Lack of Venue and/or Personal Jurisdiction)

In the event the Court finds Plaintiff's Motion is timely, Defendant elects to withdraw Affirmative Defense No. 4 "to the extent it would be construed as an affirmative defense," but "does not waive generally the defenses of lack of personal jurisdiction and improper venue or concede to Plaintiff's arguments." Def.'s Opp'n Mot. Strike, ECF No. 21 at 7–8 (emphasis in original). Accordingly, Affirmative Defense No. 4 is STRICKEN from the Amended Answer.

CONCLUSION

For the foregoing reasons, Plaintiff's Motion to Strike Affirmative Defenses, ECF No. 19, is GRANTED in part and DENIED in part. Based upon Defendant's withdrawal, Affirmative Defense No. 4 is STRICKEN from the Amended Answer. Plaintiff's Motion is otherwise DENIED as to Affirmative Defense No. 2.

IT IS SO ORDERED.

Dated: October 13, 2021

MORRISON C. ENGLAND, JR
SENIOR UNITED STATES DISTRICT JUDGE